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IN THE

Supreme Court of the United States

October Term, 1966

No. 351

ELMER KAELIN,
Petitioner.

vs.

UNIVERSITY OF PITTSBURGH, a Corporation; WILLIAM C. FREDERICK, Dean, Graduate School of Business Administration; and A. C. VAN DUSEN, Vice Chancellor, The Professions, University of Pittsburgh.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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PAGE

INDEX

	PAGE
Opinions Below	1
Basis of Jurisdiction	2
Questions Presented for Review	2
Provisions of Law Involved	2
Statement of the Case	2
Argument	3
Point I	3
Point II	6
Summary of Reasons for Granting this Writ	8
Appendix A—Opinion of the Court	9
Certificate of Service	17

TABLE OF CASES.

Barker v. Bryn Mawr College, 278 Pa. 121, 122A, 220 (1923)	13
Strank v. Mercy Hospital of Johnstown, 376 Pa. 305, 102A, 2d 170 (1945)	13

STATUTES.

71 Purdons Statutes, Section 1710.1 et seq. (Administrative Procedure Act)	7
U. S. Constitution, 14th Amendment, et al	2

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Petitioner Elmer Kaelin prays that a writ of Certiorari be granted to review the judgment of the Pennsylvania Supreme Court overruling the order of the Allegheny County Court of Common Pleas.

Opinions Below

The opinion of the Pennsylvania Supreme Court, is attached hereto, Appendix A and is also reported in 421 Pa. 220, 218A. 2d 798 (1966).

Basis for Jurisdiction

The judgment sought to be reviewed herein is that of the Pennsylvania Supreme Court entered on April 19, 1966 overruling the order of the Allegheny County Court of Common Pleas.

The Jurisdiction of your Honorable Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 1254 (1) and the Supreme Court Rules 19 (a) in that the State Court has decided a federal question of substance not heretofore determined by this Court and/or has decided it in a way probably not in accord with applicable decisions of this Court.

Questions for Review

I. Does the Defendant's receiving public funds require it to observe Constitutional due process towards the Plaintiff so as to be subject to Mandamus for failure to do so?

II. Does the Defendant's receiving public funds require it to observe proper administrative procedures and practices toward the Plaintiff so as to be subject to Mandamus for failure to do so?

Provisions of Law Involved

The Constitutional provisions and statutes which this case involves are as follows; U. S. Constitution, Amendment 14th, et al.

Statement of the Case

Plaintiff brought a Mandamus action against the Defendants alleging, *inter alia,* that the Defend-

ant Corporation is a public or quasi-public institution and that the individual Defendants have refused to certify to the President and Secretary of the Board of Trustees of the Defendant Corporation that Plaintiff is entitled to be granted a Master of Business Administration degree.

Plaintiff alleged in his Complaint that he has attended the Defendant institution from time to time since 1949 and that in October of 1963, he met with authorized representatives of the Defendant institution regarding his course of study and the requirements yet necessary to obtain the Master of Business Administration degree.

Plaintiff was advised to complete an additional 9 credits of graduate school work and was told the degree would then be granted. Plaintiff did this during the year 1964, obtaining grades of A, B plus and B plus for the three courses respectively. Defendant thereupon repudiated its latest requirements and then insisted on a written comprehensive examination.

The lower Court held for the Plaintiff, Petitioner herein, but on appeal the Pennsylvania Supreme Court reversed and dismissed.

ARGUMENT AND REASONS WHY THE WRIT SHOULD BE GRANTED

Point I

I. Does the Defendant's receiving public funds require it to observe Constitutional due process towards the Plaintiff so as to be subject to Mandamus for failure to do so?

The Defendant, UNIVERSITY OF PITTSBURGH, receives millions of dollars of State and Federal public funds each year, by way of direct appropriations, scholarship funds and research grants.

By taking these monies, the Defendant has the responsibility, growing out of its public or quasi-public status, to observe basic rudiments of constitutional due process.

By restating the Defendant's financial statement for the fiscal year ending July 31, 1965 to more fairly reflect its true sources of income; it can be shown that the Defendant receives almost 20% of its yearly operating revenues from the Commonwealth of Pennsylvania.

Furthermore, footnotes to the financial statements indicate that the Defendant has received large sums of capital for new construction; some 8.8 million for this fiscal year alone. The Defendant arbitrarily eliminates many such properties from its list of physical assets. We are left to speculate just how much the Commonwealth of Pennsylvania has "donated" each year to the Defendant by way of income and capital.

And yet, the Pennsylvania Supreme Court was able to hold that the Defendant was not a public or quasi-public institution, so as to be amenable to mandamus.

When the Defendant fails to observe the process, the State of Pennsylvania fails to do so; for as one acts, so does its alter ego. The Plaintiff brought an action in Mandamus to question this deprivation of his Constitutional rights. The Plaintiff alleged, *inter*

alia, that the Defendant, by its authorized agents, servants, and employees, arbitrarily, capriciously, maliciously and with bad faith sought to withhold from him a valuable property right—his right to the coveted Masters' Degree in Business Administration.

Public policy alone would indicate that such an authoritative and arbitrary refusal to act justly should be actionable. The Defendant has had a complete disregard for the basic concepts of legal process. It has taken this attitude while at the same time glibly speaking of fostering those revered and hallowed democratic ways of life—words which to the Plaintiff have a hollow sound.

Mandamus is, historically speaking an extraordinary remedy. It should not be used lightly or trivially. However, Pennsylvania law clearly indicates that school officials may be compelled by Mandamus to perform ministerial duties with respect to the establishment, maintenance and management of schools and students.

The only requirements for determining whether Mandamus will here lie is whether the Plaintiff has a clear, present and legal right to the Degree in question. The record in this case seems to indicate that the issuance of the Degree is strictly ministerial at this stage and not discretionary in any sense of the word.

The Pennsylvania Supreme Court, at page 225, discusses the *Strank* and *Barker* cases (which are perhaps the controlling law regarding Mandamus as it applies to educational situations) in saying they are very similar to the instant case. However, the Court goes on to say:

> "Appellee attempts to distinguish this case from those by contending that both Mercy Hospital of Johnstown and Bryn Mawr College were private corporations, and, therefore, as such, Mandamus was not the proper remedy; but that Appellant receives millions of dollars in state aid."

The Court then fails to discuss this point, the core of the question, but goes on to say:

> "We believe the appellee's distinction as to state aid be without merit, for in all three cases, the asserted rights arose from a contractual relationship between the student and the institution."

The Petitioner avers that the Pennsylvania Supreme Court's opinion fails to distinguish from those cases *not* involving public funds and those cases that *do* involve public funds. (Emphasis supplied)

Point II

II. Does the Defendant's receiving public funds require it to observe proper administrative procedures and practices toward the Plaintiff so as to be subject to Mandamus for failure to do so?

Assuming *arguendo* that the Defendant institution has the legal attributes of a state sponsored or state related organization, it then follows that it has failed to meet those minimum standards of fair and equitable administrative procedure required by law and the Constitution.

The Defendant alleges it has By-Laws to control such situations—yet these so-called By-Laws, if they in fact exist, are private, unpublished and uncirculated within the meaning of the State's administrative procedure disclosure statutes 71 Purdons Statutes, Section 1710.1 et seq.

The Defendant also says it has internal administrative remedies available for such cases. Plaintiff exhausted all these so-called "star-chamber administrative remedies" to persons who were at one and the same time, Judge, Jury, Witness and Executioner.

For the Pennsylvania Supreme Court to decide, in an incidental manner, that administrative requirements had been met, has denied to your Petitioner equal protection under the laws to which he is constitutionally entitled. The loss to the Plaintiff, financial and otherwise, is substantial and the effect of this decision on the Plaintiff and others, in this and other jurisdictions, compounds the arbitrary systems of higher education in this country.

It is suggested that the Pennsylvania Supreme Court has failed to implement the rights due the Plaintiff by holding that Mandamus will not lie because the Defendant is not a public institution. The question arises as to how much public funds are needed to qualify the Defendant as a public institution. One million? Ten million?

Any criteria based on money alone or on whether the Commonwealth does or does not appoint Trustees fails to meet the issue directly and that is whether, by taking public monies, the Defendant is

obligated accordingly. Must the Defendant, after dancing with public tax monies, now pay the piper?

Summary of Reasons for Granting This Writ

Under the facts of the case as they relate to Defendant's public nature and as it develops that the Defendant benefits from public funds, State and Federal, the remedy of mandamus directed to the Defendant will lie and the Pennsylvania Supreme Court was in error in holding otherwise, thereby reversing the Trial Court. The State has thus decided a Federal question of substantial substance not theretofore previously determined by the United States Supreme Court and has, in fact, decided a Federal question in a way probably not in accord with applicable decisions of this Court. Therefore, Certiorari should be granted.

APPENDIX A

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

ELMER KAELIN, *Appellee*

No. 125 March Term, 1966

V.

UNIVERSITY OF PITTSBURGH, a Corporation
WILLIAM C. FREDERICK, Dean, Graduate School of Business, University of Pittsburgh; and
A. C. VAN DUSEN, Vice Chancellor, the Professions, University of Pittsburgh,

Appelants

Appeal from an Order of the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 655 January Term, 1966

OPINION OF THE COURT

FILED: APRIL 19, 1966

O'BRIEN, J.

Appellee, plaintiff, filed a complaint in mandamus, alleging that, since 1949, he has from time to time enrolled in various courses at the graduate level at the University of Pittsburgh; that he was in the 48-credit program leading ultimately to a Masters' Degree in Business Administration; that over the period of years, he had accumulated in excess of the 48 credits; that the school, however, would not allow him credit for some courses which had been

completed outside the time limitation period established by the school. Appellee further alleges that in October of 1963, he and appellants' officials held a conference, at which time it was agreed that appellee should be granted his degree if he completed 9 additional credits of work prior to December 31, 1964. Appellee further alleges that he completed the courses with excellent results, and, at that time, appellant repudiated these latest requirements and insisted upon a comprehensive written examination prior to its conferring a Master's Degree in Business Administration upon him. Appellee further avers that appellants' refusal to confer this degree upon him has put him to an extreme financial disadvantage and that he has no adequate remedy at law. Appellee then prayed for a judgment in mandamus and a jury trial.

Appellant filed preliminary objections to the complaint raising the question of jurisdiction and demurrer and further alleged appellee's failure to join necessary parties. Appellee filed answers to these preliminary objections and, after oral argument, the court made its order on December 27, 1965, which it amended on December 29th, 1965, reading as follows:

> "And Now, to-wit, this 29th day of December, 1965, after oral argument and consideration of briefs, it is hereby ordered, adjudged and decreed that the preliminary objections in the form of a petition, raising a question of jurisdiction and a demurrer, are dismissed. The preliminary objection, alleging the failure to join a necessary party, is sustained, and the Plain-

tiff is given 15 days in which to amend the Complaint to include the necessary parties."

It is from this order that this appeal was taken.*

Appellee filed a motion to quash the appeal, arguing that the order appealed from is interlocutory and, hence, not appealable. Appellant contends the appeal is not quashable. This is a correct statement of the law in this instance. We said in *Com. ex rel. Fox v. Swing,* 409 Pa. 241, 243, 186 A.2d 24 (1962): "As we stated in Strank v. Mercy Hospital of Johnstown, 383 Pa. 54, 57, 117 A.2d 697 (1955), 'Plaintiff has moved to quash the appeal on the ground that the court's decree was interlocutory and not a final decree from which an appeal may properly be taken. It is true, of course, that the appeal is not from a final decree, but the very purpose of the Act of 1925 was to permit such an appeal in order that the question of jurisdiction might be preliminarily determined. The motion to quash is overruled.' "

Appellant further contends that the Court of Common Pleas has no jurisdiction or competency to determine controversies of the general class to which the case at bar belongs.

The court below held that the Act of 1893, June 8, P.L. 345, Sec. 1, 12 P.S. Sec. 1911, specifically gives the Court of Common Pleas jurisdiction in

*It should be noted that after this appeal had been taken, appellee filed an amended complaint and appellant again filed preliminary objections to the amended complaint. Appellant answered these preliminary objections to the amended complaint and after argument the court below again filed an order and an opinion on January 20, 1966. We do not consider any of these proceedings since they occurred subsequent to the filing of this appeal.

actions of mandamus when a defendant is a corporation having its chief place of business within the County, and that the University of Pittsburgh is a corporation and does have its chief place of business in Allegheny County. In *Witney v. Lebanon City,* 369 Pa. 308, 85 A.2d 106 (1952), this court reviewed at some length the question of jurisdiction of subject matter and then enunciated the principles that we have since followed. These principles were concisely summarized again by this court in *Strank v. Mercy Hospital of Johnstown,* 376 Pa. 305, 309, 102 A.2d 170 (1954), where it was said: ". . . the test for determining whether a court has jurisdiction of the subject matter is the competency of the court to determine controversies of the *general* class to which the case presented for its consideration belongs, and the controlling question is whether the court had power to enter upon the inquiry, not whether it might ultimately decide that it was unable to grant the relief sought in the particular case. It was further held that the Act of 1925 was not concerned with matters going to the right of the plaintiff to recover on his cause of action but only with his right to have his cause of action heard and determined. Again in Upholsterers' International Union of North America v. United Furniture Workers of America, C.I.O., et al., 356 Pa. 469, 473, 52 A.2d 217, Mr. Justice Jones, speaking for the Court, declared that, '. . . The thing of Chief importance on a question of jurisdiction of subject matter is not whether the plaintiff may recover in the particular forum on the cause of action pleaded but whether the court is empowered to hear and determine a controversy of the character involved: . . .'.

"Before this power to enter upon the inquiry can be affirmed to exist, it must initially be made to appear that the law has given the tribunal capacity to entertain the complaint against the person sought to be charged. Jurisdiction of the subject matter is a condition precedent to the acquisition of authority over the parties. It is conferred upon the courts by the Constitution and laws of the Commonwealth.

"In order to ascertain if the court below was empowered by law to entertain jurisdiction of the matter in controversy we must turn to the statutory provisions of the Commonwealth regarding actions of mandamus. The Act of June 8, 1893, P.L. 345, as variously amended, the last amendment being the Act of May 13, 1925, P.L. 664, 12 PS Sec. 1911, provides that, 'The several courts of common pleas shall, within their respective counties, have *the power to issue* writs of mandamus to all officers and magistrates elected or appointed in or for the respective county, or in or for any township, district, or place within such county, and to all corporations being or having their chief place of business within such county and to any corporation doing business or having its property, in whole or in part, within the county: . . .' ". (Emphasis in original). See also *McWilliams v. McCabe,* 406 Pa. 644, 648, 179 A.2d 222 (1962). The *Strank* case, 376 Pa. 305, and *Barker v. Bryn Mawr College,* 278 Pa. 121, 122 A.220 (1923), are very similar to the instant case. Appellee attempts to distinguish this case from those by contending that both Mercy Hospital of Johnstown and Bryn Mawr College were private corporations,

and, therefore, as such, mandamus was not the proper remedy; but that appellant receives millions of dollars in state aid. In the *Strank case,* 376 Pa. 305, plaintiff sought credits which the Mercy Hospital of Johnstown refused to give; in the *Bryn Mawr College* case, supra, plaintiff sought to have a student reinstated; in the instant case, appellee seeks a Master's Degree, which the appellant refuses to confer. We believe appellee's distinction as to state aid to be without merit, for in all three cases, the asserted rights arose from a contractual relationship between the student and the institution. As we said in *Strank,* 376 Pa. 305,; " 'The word 'jurisdiction' (jus dicere) is a term of large and comprehensive import and embraces every kind of judicial action, and hence every movement by a court is necessarily the exercise of jurisdiction. It includes jurisdiction over the subject matter as well as over the person. *In the sense, however, in which the term ordinarily is used,* jurisdiction may be concisely stated to be the right to adjudicate concerning the subject matter in a given case. . . .'; 14 Am. Jur., Court, Sec. 160 (emphasis supplied). In other words, the law must make the court competent to entertain the particular controversy. Unless special statutory provisions have changed the rule, the use of mandamus is limited to the enforcement of rights and duties imposed by law, and, if the right or duty rests wholly on contract, the writ will not issue to enforce it: See 55 C.J.S., Mandamus, Sec. 56."

Appellee, in his brief, contends that plaintiff has no available remedy except a writ of mandamus. He contends that an action in assumpsit for breach of contract would be 'ridiculous" and that money

damages would never be able to compensate appellee for the value of the degree he wishes to have conferred upon himself. He further contends in his brief that because the University of Pittsburgh receives aid from the Commonwealth, that it is no longer a private institution, and on that basis can be distinguished from the Mercy Hospital of Johnstown and Bryn Mawr College. With these two contentions we cannot agree. We held in *Strank v. Mercy Hospital of Johnstown,* 383 Pa. 54, 57, 117 A.2d 697 (1955): "Under the Acts of June 16, 1836, P.L. 784, Sec. 13, and February 14, 1857, P.L. 39, the courts of common pleas have the jurisdiction and powers of a court of chancery in all cases such as those in which they had theretofore possessed jurisdiction and powers under the Constitution and laws of the Commonwealth, and also so far as relates to the affording of specific relief when a recovery in damages would be an inadequate remedy. They have jurisdiction not only for the prevention of acts contrary to law and prejudicial to the rights of individuals, but also for the enforcement of obligations whether arising under express contracts, written or oral, or implied contracts, including those in which a duty may have resulted from long recognized and established customs and usages, as in this case, perhaps, between an educational institution and its students. Moreover, it is the peculiar province of equity to afford relief where the measurement of damages in such cases cannot be formulated and applied in a suit at law because of their being necessarily speculative and indeterminate, and therefore the legal remedy is not adequate and complete: H. Daroff & Sons, Inc. v. Vitullo, 350 Pa. 501, 507, 39 A.2d 595,

598; Ritz v. Rafail, 366 Pa. 274, 276, 277, 77 A.2d 411, 413. Indeed it might be said that it would be a reproach to our system of jurisprudence if plaintiff should be found entitled to the transfer credits which she seeks, but nevertheless neither law nor equity can furnish her any adequate means of redress."

As to appellee's second contention that the University of Pittsburgh is no longer a private institution, we must again disagree. Many institutions of the Commonwealth receive aid from the Commonwealth and yet are free from control by the Commonwealth. Members of the Board of Trustees of the University are not appointed by the Commonwealth, but rather are elected by the alumni or the Board itself, and they control the administration of the University's affairs through personnel employed by them.

In such circumstances, mandamus will not lie and the complaint must be dismissed.

Order reversed and complaint dismissed.

MR. JUSTICE COHEN FILES A CONCURRING OPINION.

MR. JUSTICE ROBERTS CONCURS IN THE RESULT.

CONCURRING OPINION

COHEN, J.

FILED: April 19, 1966

I concur in the result only because *Strank v. Mercy Hospital of Johnstown,* 376 Pa. 305, 102 A 2d 170 (1954), indicates that the jurisdiction of the Court of Common Pleas in situations such as this is exerciseable in equity.

Certificate of Service

I certify that I have served five copies of the foregoing Petition with Charles C Arensberg, Attorney for the Defendant, personally.

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Attorney for Petitioner